

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SAMUEL AND LOSSIE SINGLETON	:	ORDER
	:	DTA NO. 815592
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City Income	:	
Taxes under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Year 1991.	:	

Petitioners, Samuel and Lossie Singleton, 113-28 212th Street, Queens Village, New York 11429, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1991.

The Division of Taxation appearing by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel) brought a motion for summary determination on the ground that petitioners failed to file a request for conciliation conference within 90 days of the issuance of the Notice of Deficiency.

The Division of Taxation, together with its Notice of Motion, submitted the affidavit of Christina L. Seifert, Esq., with attachments, including the affidavits of Geraldine Mahon and James Baisley, in support of its motion.

Petitioners, appearing by Earnest Clay, P.A., did not respond to the motion of the Division of Taxation.

The Division of Taxation's motion was filed on June 13, 1997.

Petitioners' response was due on July 14, 1997, which date began the 90-day period for issuance of this determination.

Upon review of the pleadings, and the affidavits and documents submitted in support of the motion of the Division of Taxation, Roberta Moseley Nero, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation has established that there are no material facts at issue and the material facts as presented entitle it to a determination granting summary determination in its favor on the ground that petitioners request for conciliation conference was untimely.

FINDINGS OF FACT

1. The Division of Taxation (hereinafter "Division") issued a Notice of Deficiency (notice number L-011444802) dated May 20, 1996 to Samuel Singleton and Lossie Singleton. The notice was for personal income tax for the year 1991 and set forth tax due of \$4,803.00, interest of \$1,594.61 and penalty of \$2,238.19 for a total amount due of \$8,635.80.

2. Under the heading of "EXPLANATION AND INSTRUCTIONS" the notice provides:

“NOTE: Any disagreement previously submitted for the Statement of proposed Audit Changes cannot be considered a disagreement with this notice. You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 8/18/96.

* * *

"If we do not receive a response to this notice by 8/18/96:

This notice will become an assessment subject to collection

action.¹

3. The Division submitted a copy of petitioners' Request for Conciliation Conference, in the form of a payment document, dated September 20, 1996, and date stamped October 8, 1996 by the Bureau of Conciliation and Mediation Services (hereinafter "BCMS"). The Division also submitted a copy of the envelope containing the request. The postmark on the copy of the envelope submitted reads "2- SE"; the second digit after the 2 was not clear. The year of the postmark, 1996, is legible. The affidavit of Ms. Seifert, the Division's representative, states that her affidavit was based upon a review of the Division's records (which presumably would have included the original envelope), and that the envelope was postmarked September 23, 1996. Furthermore, a September 23, 1996 postmark is consistent with the legible portion of the postmark on the copy of the envelope submitted as well as the date the document was signed, September 20, 1996. This date does not correspond with the October 8, 1996 date stamped on the document by BCMS, which would indicate that if the document was mailed on September 23, 1996 it took 15 days for the document to be received by BCMS. Neither party attempted to explain this discrepancy or comment on the illegible postmark.

4. A Conciliation Order Dismissing Request, dated November 29, 1996, was issued by BCMS. The reason for dismissing petitioners' request was:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on May 20, 1996, but the request was not mailed until September 23, 1996, or in

¹August 18, 1996 is the due date for a request for conciliation conference or petition as listed on the Notice of Deficiency. However, the -correct due date was August 19, 1996 (see, Conclusion of Law 'IG'; footnote

excess of 90 days, the request is late filed."

A petition protesting this order was filed by petitioners with the Division of Tax Appeals on January 7, 1997.

5. The Division submitted the affidavits of: Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System (hereinafter "CARTS") Control Unit of the Division since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing, and James Baisley, Chief Mail Processing Clerk, Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office.

These affidavits describe the general procedures for the preparation and mailing of notices of deficiency. The affidavits also describe how such procedures were followed in this case.

6. The general process for issuing and mailing notices of deficiency begins with the CARTS Control Unit's receiving a computer printout entitled "Assessments Receivable, Certified Record for Zip +4 Minimum Discount Mail", referred to as a Certified Mail Record (hereinafter "CMR"), and the corresponding notices of deficiency. The CMR is printed approximately ten days prior to mailing to allow time for processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

A Division employee places each notice in an envelope. Once the notices are "placed in the 'Outgoing Certified Mail' basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places 'postage' and 'fee' amounts on the letters." Then a mail processing clerk compares the information on the envelopes with that on the CMR and counts the envelopes. At some point in this process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to the Colonie Center Branch of the United States Postal Service in Albany, New York. A postal employee signs and/or affixes a postmark to the CMR. The employee of the Mail Processing Center also requests the postal employee to either write in the number of pieces received at the post office in the space provided or circle the number for the pieces listed to indicate that was the number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the CARTS Control Unit. In cases of multipage CMRS, the pages are connected when delivered; to the United States Postal Service and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

7. In support of its position that the procedures outlined in Finding of Fact "6", were followed in this case, the Division has also submitted a copy of the CMR listing notice number L-01144482, the notice at issue in this matter. The CMR consists of 34 pages with 11

entries on each page with the exception of page 34 which has only three entries. It shows a printed date of "05/09/96" on each of the 34 pages. On page one the printed date has a line through it and above it is the handwritten date of "5-20-96". There is a consecutive listing of 366 certified control numbers beginning with P 911 002 002 and ending with P 911 002 367. There is a Postal Service postmark of May 20, 1996 on each page of the CMR.² On the last page next to "TOTAL PIECES AND AMOUNTS LISTED" appears the printed number 366, which is crossed out, the handwritten number 365 which is crossed out, and the handwritten number 364 which is circled. There is nothing else appearing after the words "TOTAL PIECES RECEIVED AT POST OFFICE". There is a United States Postal Service postmark of May 20, 1996 and initials to the left of the postmark. Mr. Baisley's affidavit explains the changes made to the "TOTAL PIECES AND AMOUNTS LISTED" as follows:

"On page 34 of this certified mail record 366 pieces of mail were listed as being sent to the United States Postal Service. This number was manually changed to 365 and again changed to 364 to reflect the fact that 2 pieces of certified mail were 'pulled' from the mailing record. For example, a piece of mail can be pulled to correct a discrepancy in a name or an address. The piece of pulled mail will be segregated from this group of Notices for correction and issuance at another time. A review of this mail record reflects the fact that 2 pieces of mail were 'pulled' from page 30. The pieces of mail assigned certified control numbers P 911 002 330 and P 911 002 331 on page 30 of the certified mail log were pulled, a line was placed through the certified number, the notice number and the name and street address of these taxpayers. These deletions are reflected in the change of the total number of pieces of mail listed on page 34. No such mark is made on or near the listing for Samuel Singleton."

Petitioner Samuel Singleton's name is listed on page 23 of the CMR. The certified number listed for the notice sent to petitioner Samuel Singleton is P 911 022 249 which

²The United States Postal Service postmark is not completely legible on each of the 34 pages of the CMR. It is however, legible on the first and last pages of the CMR and on page 23 where petitioner Samuel Singleton's name appears.

matches the certified number shown at the top of petitioners' notice. The notice number listed on the CMR for petitioner Samuel Singleton's notice is L 011444802 which matches the number appearing on the notice. The name and address of petitioner Samuel Singleton are listed next and also correspond to the information set forth on petitioners' notice. There is a United States Postal Service postmark of May 20, 1996 on page 23 of the CMR.

There is no listing on the CMR for petitioner Lossie Singleton. The affidavits submitted by the Division in support of its motion clearly refer to both petitioners as being listed on the notice of deficiency and only to petitioner Samuel Singleton in regard to the CMR. There is nothing in any of the affidavits or documents submitted by the Division that attempts to explain this discrepancy.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

"Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit ' made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor." (20 NYCRR 3000.9[b][1]; see also, Tax Law § 2006[6].)

In reviewing a motion for summary.determination, an administrative law judge is constrained by the following guidelines:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination

without the necessity of a cross-motion." (20 NYCRR 3000.9[b][1], see also, Tax Law § 2006 [6].)

Petitioners in this case did not respond to the motion of the Division for summary determination. Therefore, petitioners are deemed to have conceded that the facts as presented by the affidavits submitted by the Division are correct (see, Kuehne & Nagel v. Baden, supra, 36 NY2d at 544, 369 NYS2d at 671; Whelan By Whelan v. GTE Sylvania, 182 AD2d 446, 582 NYS2d 170, 173).

B. It is the contention of the Division that it is entitled to summary determination in its favor because petitioners failed to file a timely request for a conciliation conference or petition for a tax appeals hearing. Pursuant to Tax Law §§ 2 and 689(b), petitioners had 90 days from the mailing of the Notice of Deficiency to file a petition with the Division of Tax Appeals. Petitioners also had the option, pursuant to Tax Law § 170(3-a), to file a request for a conciliation conference with BCMS. Petitioners in this case chose to file a request for conciliation conference. The time requirement for filing such a request is the same as the time allowed to file a petition with the Division of Tax Appeals, i.e., 90 days from the mailing of the Notice of Deficiency (Tax Law § 170(3-a); § 689[b]).

C. Where the timeliness of either a petition filed with the Division of Tax Appeals or a request for conciliation conference filed with BCMS is at issue, it is incumbent upon the Division to show that its original notice was properly mailed and when it was mailed. In Matter of Brager (Tax Appeals Tribunal, May 23, 1996 [a similar case dealing with the timeliness of a petition measured from the issuance of a notice of deficiency]) the Tax Appeals Tribunal summarized such requirements as follows:

"When the timeliness of a filed petition is at issue, the Division must demonstrate proper

mailing (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991) To show that the notices were properly mailed to the taxpayer's last known address by certified or registered mail, the Division must provide evidence as to the general mailing procedure and evidence that this procedure was adhered to with respect to the notice in question (Matter of Katz, *supra*; Matter of Novar TV & Air Conditioner Sales & Serv., *supra*). Once this burden is met, a presumption of proper mailing arises (Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112). If, on the other hand, the Division fails to affirmatively carry its burden and the date of mailing is not established, the statutory time period is not triggered and the petition will be deemed timely filed (Matter of Katz, *supra*; Matter of Huang, Tax Appeals Tribunal, April 27, 1995; Matter of Fuchs, Tax Appeals Tribunal, April 20, 1995)." (Matter of Brager, Tax Appeals Tribunal, May 23, 1996.)

D. The Mahon and Baisley affidavits establish the general mailing procedures for mailing of notices of deficiency. The process begins in the CARTS Control Unit. Notices are printed with a future anticipated date of mailing to allow time for the processing of the notices. A certified control number is placed on each notice. The CMR lists each notice number, the name and address of the taxpayer and a corresponding certified mail number. The notices are placed in envelopes. In the Mail Processing Center, employees weigh and seal the envelopes containing the notices, ensure the proper postage and fees are affixed to the envelopes, compare the information on the envelopes with that on the CMR, count the envelopes, and change the date on page one of the CMR from the date it was printed to the date the CMR and notices are to be delivered to the post office. The CMR and the notices are then delivered to the post office. A postal employee signs and/or affixes a postmark to the CMR. The postal employee is requested to either write in the number of pieces received at the post office in the space provided or circle the number for the pieces listed to indicate that was the number received. Usually on the next day an employee of the Mail Processing Center returns to the post office to pick up the completed CMR. Completed CMRs are then returned to the CARTS Control Unit.

In cases of multipage CMRS, the pages are connected when delivered to the United States Postal Service and remain connected even after delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

E. With regard to petitioner Samuel Singleton, the CHR submitted illustrates that the Division's mailing procedures were followed in this case. The name, address, notice number and certified control number on the notice issued to petitioners correspond with those listed on the CMR for petitioner Samuel Singleton. The date of the Postal Service postmark on the page of the CMR listing the notice at issue, and the last page where the postal service employee's signature is found, indicates the notices were mailed on May 20, 1996.

The only possible problem presented by the CMR, in regard to petitioner Samuel Singleton, is that there was no number provided in the space allowed for "TOTAL PIECES RECEIVED AT POST OFFICE" (see, Matter of Braizer, *supra*; Matter of Roland, *supra*). The Division has introduced evidence in this matter that was not submitted in either Brager or Roland. The affidavits submitted in those cases stated that on the CMR a Postal Service employee had circled the pieces listed number to indicate the pieces received at the post office, instead of writing in the number in the space provided on the CMR. The Tribunal held those affidavits insufficient because there was no mention of the basis of the affiant's knowledge. In the present matter Mr. Baisley's affidavit indicates that Mail Processing Center staff request the postal employees to either write in the number of pieces received at the post office in the space provided, or circle the pieces listed to indicate the number of pieces received at the post office. The CMR submitted in this matter has a circle around the number of pieces listed. Therefore, pursuant to the procedures of the Division, this is a properly completed CMR.

The Tax Appeals Tribunal has held that evidence of general mailing procedures together with a properly completed CMR is sufficient to prove mailing (see, Matter of Katz, supra). Since there is both, with regard to petitioner Samuel Singleton, the Division is entitled to the presumption of proper mailing in this case. Notice of Deficiency number L-011444802 for personal income tax for the year 1991, was issued and mailed to petitioner Samuel Singleton on May 20, 1996.

F. The remaining question is whether petitioner Samuel Singleton timely filed his request for conciliation conference. Pursuant to Tax Law §§ 2, 170(3-a) and 689(b), he had 90 days from the mailing of the Notice of Deficiency to file a request for a conciliation conference with BCMS. Counting 90 days from May 20, 1996 results in an August 19, 1996 due date for the request.³ The postmark on the copy of the envelope which contained the request submitted by the Division is illegible. When a postmark is illegible it is usually the burden of the party required to file the document to prove the date of the postmark (20 NYCRR 3000.22[a][2][iii]). However, in this case where the Division submitted a copy of the envelope with an affidavit based upon the records of the Division (which presumably include the original envelope), stating that September 23, 1996 was the date of the postmark and the other party did not respond to this statement of fact, it may be deemed to be admitted. Since the other party also did not respond to the fact alleged by the Division that the request was received by BCMS 15 days later on October 8, 1996, this fact may also be deemed to be admitted. (See, Kuehne &

³90 days from May 20, 1996 was August 18, 1996 which was a Sunday, making Monday, August 19, 1996 the due date for the request (see, Tax Law § 691(c); General Construction Law §§ 20, 25-a; Matter of American Express Co., Tax Appeals Tribunal, July 3, 1991).

Nagel v. Baden, supra, 36 NY2d at 544, 369 NYS2d at 671; Whelan By Whelan v. GTE Sylvania, supra, 582 NYS2d at 173.)

The notice was issued on May 20, 1996, making petitioner Samuel Singleton's request for conciliation conference due by August 19, 1996. The request was filed on September 23, 1996 and received on October 8, 1996. There being no timely request for a conciliation conference, the petition of petitioner Samuel Singleton must be dismissed (see, Matter of 3410 Pons Food p., Tax Appeals Tribunal, September 7, 1995; Matter of Greene Valley Liquors, Tax Appeals Tribunal, November 25, 1992).

G. With regard to petitioner Lossie Singleton the evidence as submitted by the Division presents a triable issue of fact. Lossie Singleton's name, while appearing on the Notice of Determination, does not appear on the CMR. The Division did not attempt to explain this discrepancy. Several different inferences can be drawn from the facts as presented by the Division concerning what, if anything, was actually mailed to petitioner Lossie Singleton. Therefore, the Division's motion must fail (see, Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881). A hearing on the issue of the timeliness of petitioner Lossie Singleton's request for a conciliation conference will be scheduled.

H. With regard to petitioner Samuel Singleton, the Division is granted summary determination and the petition of Samuel Singleton is dismissed.

I. With regard to petitioner Lossie Singleton, the motion of the Division for summary determination is denied. A hearing will be scheduled on the issue of the timeliness of Lossie Singleton's request for a conciliation conference.

DATED: Troy, New York
OCT 02 1997

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE